No. 79-1180

In the Supreme Court of the United States

OCTOBER TERM, 1979

ADRIAN G. DUPLANTIER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 606 F. 2d 654. The opinion of the district court (Pet. App. 45a-57a) is reported at 480 F. Supp. 40.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on November 19, 1979. A timely petition for rehearing was denied on December 12, 1979 (Pet. App. 43a-45a). The petition for a writ of certiorari was filed on January 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the financial disclosure provisions of the Ethics in Government Act of 1978, as applicable to federal judges, are unconstitutional.

STATEMENT

The Ethics in Government Act of 1978 (Pub. L. No. 95-521, 92 Stat. 1824) requires, insofar as pertinent here, that high-ranking Executive officials, members of Congress, and federal judges annually file public financial reports. The Act became effective for federal judges on January 1, 1979 (28 U.S.C. App. (Supp. II) 309). Judges who performed their official duties for a period in excess of 60 days during 1978 were required, on or before May 15, 1979, to file financial reports with the Judicial Ethics Committee of the Judicial Conference of the United States and with the clerks of their respective courts (28 U.S.C. App. (Supp. II) 301(c), 303(b)).

1. On May 14, 1979, petitioners, seven district court judges covered by the Ethics Act for 1978, commenced this class action in the United States District Court for the Eastern District of Louisiana to challenge the constitutionality of the Act's provisions that apply to federal judges (Pet. App. 6a).[1] After a conference with counsel, the district court on May 15 entered a temporary restraining order enjoining enforcement of those provisions (*id.* at 47a-48a). The order was issued not only against the United States, the only named defendant, but also against the Attorney General, the Judicial Ethics Committee and its chairman, Judge Edward A. Tamm, and the clerks of all federal courts presided over by judges

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[1]The original complaint named six judges as plaintiffs, but on June 4, 1979, a seventh plaintiff-judge was added.

appointed under Article III (*id.* at 57a-60a) Subsequently, petitioners amended their complaint to add as defendants the Attorney General in his individual and official capacities, Judge Tamm in his individual and official capacities, and the Judicial Ethics Committee (*id.* at 7a).

The United States moved to dismiss the action and to dissolve the temporary restraining order (Pet. App. 48a). Counsel for the United States, through a special appearance, also contested the district court's jurisdiction over Judge Tamm, the Judicial Ethics Committee, and the clerks of all federal courts (*ibid.*).[2] Following an evidentiary hearing held on May 25, 1979, the district court extended the temporary restraining order for 10 days and took under advisement the government's motion to dismiss and petitioners' motion for a preliminary injunction (*ibid.*).

On June 4 the district court issued an opinion denying petitioners' request for a preliminary injunction (Pet. App. 45a-57a). The court held that it lacked jurisdiction over Judge Tamm, the Judicial Ethics Committee, and the clerks of the federal courts (*id.* at 49a-55a). The court also held that since petitioners were primarily seeking to enjoin the public disclosure of their financial reports, and since the court had no jurisdiction over the persons with whom those reports had been or were to be filed, a decision in this case favorable to petitioners would afford "premature and incomplete relief" (*id.* at 56a). For this reason, and

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[2]On May 16, 1979, the United States District Court for the District of Colorado determined that the district court in this case "was without jurisdiction to issue any * * * restraining order" against the clerk of the District of Colorado, and it instructed its clerk to release to the public all financial reports filed with him by the judges of that court. *In re Financial Disclosure Act* (D. Colo.).

despite the district court's recognition that it had jurisdiction over the United States and the Attorney General in his official capacity, the court decided to "defer reaching the merits as to the United States or the Attorney General until it becomes clear which court may exercise jurisdiction over all parties and grant complete relief" (*ibid.*). Although the court therefore refused to grant a preliminary injunction, it "stayed" (*id.* at 58a-59a) the United States, the Attorney General, the Judicial Ethics Committee and Judge Tamm, and the clerks of the federal courts, from enforcing the provisions of the Ethics Act that apply to federal judges "pending appeal of this decision or a final disposition on the merits before a court having *in personam* jurisdiction as to all parties" (*id.* at 58a).

2. The court of appeals affirmed the denial of the preliminary injunction (Pet. App. 1a-41a). Although the court of appeals upheld the district court's determination that it lacked personal jurisdiction over Judge Tamm and the Judicial Ethics Committee, the court of appeals held that the district court "did have jurisdiction to test the constitutionality of the Act in the suit against the United States and the Attorney General" (*id.* at 22a). "Because of the great public importance of the Ethics in Government Act of 1978, and in the interest of judicial economy" (*ibid.*), the court of appeals then proceeded to address the merits of petitioners' contentions and unanimously sustained the constitutionality of the provisions of the Act that apply to federal judges (*id.* at 22a-41a). Accordingly,

the court of appeals vacated the district court's order staying enforcement of the Act (*id.* at 41a, 43a).[3]

ARGUMENT

The court of appeals fully considered and rejected petitioners' constitutional arguments in a thorough opinion upon which we rely. The decision below is correct and does not conflict with the decisions of this Court or of any other court of appeals, and further review is not warranted.

1. Petitioners contend (Pet. 5-7) that the Ethics Act violates the doctrine of separation of powers. Petitioners concede (*id.* at 6) the validity of the Act's requirement of disclosure to the Judicial Ethics Committee, but they argue that public disclosure of the specified information might subject judges to political or social pressure and the threat of physical attack, thereby undermining judicial independence.[4]

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[3]The court of appeals' mandate was initially stayed under Fed. R. App. P. 41(a) when petitioners timely sought rehearing. After rehearing was denied, the court of appeals granted petitioners' motion pursuant to Fed. R. App. P. 41(b) for a stay of the mandate pending application to this Court for a writ of certiorari, and that stay remains in effect until final disposition by this Court.

[4]We note that prior to passage of the Ethics Act, federal judges (other than the Justices of this Court) were covered by guidelines of the American Bar Association and the Judicial Conference of the United States providing for the filing of semi-annual financial reports that would be available to the public. However, these reports were voluntary and included only gifts or earned income (but not assets or unearned income) in excess of $100. Congress' dissatisfaction with the narrow and unenforceable nature of these provisions prompted the inclusion of federal judges in the Ethics Act. See S. Rep. No. 95-170, 95th Cong., 2d Sess. 27-28 (1978).

This claim is without merit. Even accepting that these risks might result from public disclosure and that the principle of separation of powers serves to protect Article III judges from such dangers incident to compliance with the statute, the Ethics Act is not an unconstitutional intrusion into the affairs of the Judicial Branch. As this Court recently recognized in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977):

> [S]eparation of powers [does not require] three airtight departments of government * * *. Rather, in determining whether [an Act of Congress] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [affected branch] from accomplishing its constitutionally assigned functions. * * * Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

In this case, as the court of appeals concluded (Pet. App. 28a), whatever potential for disruption there may be "is justified by the promotion of important objectives within the constitutional authority of Congress." Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 66-68 (1976). The court found, based on its review of the legislative history, that the Ethics Act was designed "to increase public confidence in all three branches of the federal government, demonstrate the high level of integrity of the vast majority of government officials, deter conflicts of interest from arising, deter some persons who should not be entering public service from doing so, and better enable the public

to judge the performance of public officials" (Pet. App. 26a-27a; footnote omitted). The court also found that these legislative goals were not inapplicable to the judiciary since "federal judges are important governmental officers in whom the public at large has a substantial interest * * * [and who] frequently have [a] dramatic impact upon the lives of every citizen of this country" (*id.* at 28a). On that basis, the court of appeals held that "Congress' determination that personal financial disclosure by federal judges will serve such 'substantial federal interests' as restoring public confidence and deterring conflicts of interest is [not] constitutionally impermissible" (*ibid.*).

Petitioners seek to answer the court of appeals' analysis by arguing (Pet. 6) that federal judges are not elected to office and that the objectives of the Act can substantially be achieved by means of the confirmation process for judges and by disclosure to litigants in individual cases on a "need-to-know" basis. These arguments are unavailing. The fact that federal judges are appointed rather than elected does not detract from either the public's legitimate interest in evaluating their performance in office or the need to deter conflicts of interest. Moreover, the public's appraisal of the federal judiciary also bears on its assessment of the President and the Senate, the elected officials responsible for the appointment and approval of judges. Nor are the alternatives urged by petitioners effective substitutes for the Ethics Act. As the court of appeals observed (Pet. App. 35a), "[w]hile nomination and confirmation procedures no doubt weed out certain persons who should not serve as federal judges, they do nothing to scrutinize the behavior of judges once confirmed." Similarly, voluntary disclosure to the parties in individual cases would neither serve to deter possible conflicts of interest by judges nor enhance general public

confidence in the honesty and impartiality of the judiciary. Thus, as the court of appeals concluded (*ibid.*), "Congress could legitimately conclude that the statutory controls mandated by the Act would further the interests of judicial integrity."[5]

2. Petitioners next contend (Pet. 7-8) that the Ethics Act violates their constitutional right of privacy. Once again, petitioners focus on the fact that their financial disclosures under the Act are to be made available to the public.

The court of appeals properly rejected this claim. "[J]udges are 'not ordinary citizens' but are rather people 'who have chosen' to accept public office. * * * Though not chosen by the public, they themselves have elected to assume public responsibility. That fact, in itself 'puts some limits on the privacy that they may reasonably expect' " (Pet. App. 34a, quoting *Plante* v. *Gonzalez*, 575 F. 2d 1119, 1135 (5th Cir. 1978)). The public's legitimate interest in the performance of federal judges, and the balance between that interest and the judges' reasonable expectation of privacy, are not diametrically altered simply because judges are appointed to the bench for life rather than being elected to office for a term of years. Moreover, as discussed above (see pages 7-8, *supra*), the objectives

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[5]The court of appeals also noted (Pet. App. 36a) that "[i]n part, the Act is a means of effectuating 28 U.S.C. § 455(b)(4), which requires a judge to disqualify himself in matters in which he has a financial interest." See also Pet. App. 28a. Contrary to petitioners' assertion (Pet. 11-12), the constitutionality of the disqualification statute is beyond serious doubt. See *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927); *Marquette Cement Manufacturing Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 593 (7th Cir. 1945).

of the Ethics Act could not be adequately achieved by the alternatives advanced by petitioners.[6]

3. Petitioners finally contend (Pet. 9) that the Ethics Act, as applied to federal judges, bears no rational relationship to any legitimate legislative purpose and therefore violates their right of substantive due process. This argument is insubstantial. As the court of appeals found (Pet. App. 37a), and as discussed above (see pages 6-8, *supra*), the Act substantially serves several important objectives, such as better enabling the public to be informed about the performance of the federal judiciary and deterring judicial conflicts of interest. These statutory purposes are reasonably related to the provisions of the Act and are sufficient to meet the requirements of the Due Process Clause. To the extent that petitioners' due process claim amounts to a dispute over the wisdom or appropriateness of the Act, their argument is misconceived, for "legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. * * * [I]f [the] experiment [embodied in the Ethics Act]

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[6]As the court of appeals noted (Pet. App. 39a-40a n.40), 34 states have financial disclosure requirements for public officials, including 23 states that apply these requirements to judges. These provisions have been upheld by numerous courts against challenges, like petitioners', based on a constitutional right of privacy (see *Plante* v. *Gonzalez*, 575 F. 2d 1119, 1136 n.26 (5th Cir. 1978), and cases cited therein), and on three occasions appeals involving such decisions have been dismissed by this Court for want of a substantial federal question. See *Montgomery County* v. *Walsh*, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901 (1976); *Fritz* v. *Gorton*, 83 Wash.2d 275, 517 P.2d 911 (statute applicable, *inter alia*, to judges), appeal dismissed, 417 U.S. 902 (1974); *Stein* v. *Howlett*, 52 Ill.2d 570, 289 N.E.2d 409 (1972) (same), appeal dismissed, 412 U.S. 925 (1973).

fails[,] * * * the legislative process remains available to terminate the unwise experiment." *Whalen* v. *Roe*, 429 U.S. 589, 597, 598 (1977) (footnote omitted).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980

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[7]Although petitioners' "Questions Presented for Review" includes a challenge to the Ethics Act on equal protection grounds (Pet. 3), they do not separately discuss that claim. Insofar as this issue is presented, we rely on the portion of the court of appeals' opinion (Pet. App. 36a-37a) that rejected the argument below. See also S. Rep. No. 95-170, *supra*, at 131 (judges required to file report with the Judicial Conference and with the clerk of the court on which they sit "so that litigants and private citizens will have easy access to such a report").

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